RECORD AND BRIEFS

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No. 15-1256

In The
Supreme Court of the United States

SHANNON NELSON AND LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

AMICUS CURIAE BRIEF OF THE COLORADO CRIMINAL DEFENSE BAR IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Colorado law, the only way a defendant can recover any of the monetary penalties imposed as a result of a criminal conviction that is subsequently reversed, is to file a separate civil action against the state and prove his or her "actual innocence" by "clear and convincing evidence."

The Question Presented is whether Colorado law violates due process.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Colorado Criminal Defense Bar ("CCDB") was formed in 1979 and with over 800 members, is the largest criminal defense bar association in the State of Colorado. Our members – attorneys, paralegals and investigators in both the public and private sectors – are dedicated to the representation of criminal defendants, including the indigent.

The CCDB works to ensure that Colorado's criminal justice system embodies the principles of liberty, justice and equality. To that end, and among other things, it actively supports the adoption of policies and laws that safeguard the rights of criminal defendants. The CCDB maintains a lobbying arm that promotes the interests of its members (and their clients) in the Colorado General Assembly. In fact, the CCDB was one of the key proponents of the "Exoneration Act" that is at issue in this case. Having encouraged its enactment, the CCDB is keenly interested in seeing that the Act is applied in a way that is consistent with constitutional norms.[1]

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[1] Pursuant to Sup.Ct.R. 37.6, undersigned counsel hereby discloses that no part of this brief was authored by counsel for any party, no party or counsel made any monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than *amicus* or its members made such a monetary contribution.

All parties received 10-day notice of *amicus curiae*'s intention to file this brief. This brief is filed with the consent of all parties.

SUMMARY OF THE ARGUMENT

Criminal defendants seeking to obtain an award of damages under Colorado's Exoneration Act face an extraordinarily high burden: The Act requires that they prove "actual innocence" by "clear and convincing evidence." That high burden stems from the fact that the statute was designed to redress only the most extraordinary of cases. When that burden is met, the Act mandates the award of a broad range of compensatory damages and other forms of relief, including the repayment of monetary penalties imposed as a result of the conviction that is the subject of the exoneration. But the Colorado legislature understood that awards under the Act would be rare. Indeed, the General Assembly assumed that only a handful of defendants would be able to invoke the statute each year, and that even fewer – on average, *one person every five years* – would actually prevail on a claim brought under the Act.

Nonetheless, the Act constitutes the only mechanism available under Colorado law for the recovery of monetary penalties imposed in connection with a criminal conviction that is eventually reversed. As such, and while obviously well-intentioned, the Act denies the overwhelming majority of defendants – those who obtain a reversal of their convictions but are unlikely to be able to establish actual innocence by clear and convincing evidence – any realistic possibility of such a recovery. By doing so, the Act denies defendants their right to due process.

ARGUMENT

Section 13-65-101 through 103, C.R.S. (2013) (the "Exoneration Act" or "Act"), originated in the Colorado House Judiciary Committee largely in response to the case of Robert Dewey, and based upon the perception that Colorado lagged behind other states in addressing how to deal with cases like Mr. Dewey's. *Colorado House Judiciary Committee*, Hearing on HB 13-1230, March 7, 2013 at 2:40-3:00; 4:00-:10 (statements of Reps. Williams and Pabon) (hereafter cited as "House Judiciary Hearing").[2]

Mr. Dewey was convicted of murder in a Colorado state court and served eighteen years of a life sentence before being exonerated of the crime by DNA evidence. *Id.* at 2:40-:45.[3] Mr. Dewey was released from prison with only the proverbial "clothes on his back," and he found it difficult to reintegrate into society. *House Judiciary Hearing* at 1:13:07-:33 (testimony of Robert Dewey). He also found that his skills as a construction worker had become hopelessly outdated during the term of his incarceration, and work was hard to find. *Id.* at 1:22:26-23:20.

The principal sponsors of the legislation believed that the state of Colorado owed a moral responsibility to try, however inadequately, to right the injustice that had been done to Mr. Dewey and others who might

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[2] Audio link available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=21&clip_id=3214

[3] *See also* http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3910

follow in his footsteps. *E.g. House Judiciary Hearing* at 00:55-02:13 (Rep. Williams); 4:36-5:16 (Rep. Pabon). The sponsors of the measure lauded Colorado's justice system and made clear that the Act did not seek to assign blame to anyone, but they recognized that the justice system was not infallible: Mistakes, no matter how uncommon, inevitably would be made. *Id.* at 5:19-:43 (Rep. Pabon); *Colorado House of Representatives*, April 8, 2013 at 51:00-52:39 (Rep. Pabon).[4] Thus, the sponsors argued that Colorado should join the federal government, 27 other states, and the District of Columbia, by enacting legislation designed to compensate defendants incarcerated for crimes they eventually were exonerated of. *House Judiciary Hearing* at 5:43-:50 (Rep. Pabon).

The legislation garnered widespread support. The Colorado Attorney General's Office supported it, as did the District Attorney for the Twentieth Judicial District. So too did the CCDB, the American Civil Liberties Union, and Mr. Dewey himself. *See generally id.* at 15:33-16:10 (Rep. Pabon). No individual or entity spoke in opposition to the measure.

Throughout the legislative process, the Act's supporters emphasized the limited nature of the remedy being proposed. The Act was not designed to compensate defendants "who get off on some sort of technicality," it was designed only for those who are "actually innocent." *Id.* at 16:15-:30 (Rep. Pabon). The legislation

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[4] Audio link available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=15&clip_id=3610

was "narrowly restricted" and would not apply to defendants who "are just acquitted after trial" or those "who just have their convictions reversed on appeal for some procedural or legal error." *Colorado Senate Judiciary Hearing*, Hearing on HB 13-1230, April 24, 2013 at 1:47:58-48:20 (statement Assistant Attorney General Julie Selsberg).[5] *See also Colorado House of Representatives*, April 8, 2013 at 46:15-:25 (Rep. Pabon) (explaining that the Judiciary Committee drafted the legislation to ensure that "only those that are truly innocent [would] be allowed to petition" under the Act).

Consequently, the General Assembly assumed that the probable fiscal impact of the legislation would be modest. Initially, the legislature projected that during the remainder of fiscal year 2013 and all of fiscal year 2014, thirty-seven defendants would be eligible to file a petition under the Exoneration Act, two of those petitions would go to trial, and one petitioner would obtain an award of compensation under the Act per year. *State and Local Fiscal Impact*, HB13-1230 at p. 2 (Feb. 21, 2013).[6] However, those figures were reduced in subsequent fiscal impact studies. Before any committees actually voted on the legislation, the General Assembly was operating under the assumption that in fiscal years 2013-14, eight defendants would file petitions under the Act, one case would go to trial, and one

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[5] Audio link available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=47&clip_id=3854

[6] Report available at http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/825B615B5119309187257A83006D046D?Open&file=HB1230_00.pdf

petitioner would win an award of compensation under the Act every five years. *E.g. State and Local Fiscal Impact*, HB13-1230 at p. 2 (March 26, 2013);[7] *State and Local Fiscal Impact*, HB13-1230 at p. 2 (April 22, 2013).[8]

The Attorney General of Colorado testified that in his view, the legislation would apply even more narrowly than that. According to the Attorney General's figures, between 2007 and 2012, 207 criminal convictions were reversed or vacated in Colorado. *House Judiciary Hearing* at 48:50-49:32 (statement of Attorney General John Suthers). Of those, forty-seven cases were dismissed following reversal or the defendants were acquitted after retrial (one of those events is a prerequisite to filing under the Act). *Ibid.* Thus, "it's a relatively small pool of people who [will] . . . be able to seek compensation for wrongful incarceration," and in the Attorney General's view, an even smaller pool of people who might prevail on such claims. *Ibid.* More precisely, among the forty-seven defendants eligible to even file a petition for compensation during the five-year period in question, the Attorney General opined that "none of those people are likely to be in a position to prove actual innocence." *Id.* at 51:12-:30.

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[7] Report available at http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/825B615B5119309187257A83006D046D?Open&file=HB1230_r1.pdf

[8] Report available at http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/825B615B5119309187257A83006D046D?Open&file=HB1230_r2.pdf

The House Judiciary Committee passed the legislation unanimously. *House Judiciary Hearing* at 1:57:20-:36. The measure passed the full House by a vote of 60-2,[9] and the full Senate passed the bill unanimously.[10] The Governor signed the legislation into law on June 5, 2013.[11]

The law is entitled "Compensation for Certain Exonerated Persons." As its title indicates, and the legislative history confirms, the Act's primary purpose is to compensate individuals who have been "exonerated" of crimes, meaning, "a person who has been determined . . . to be actually innocent." §13-65-101(3).

By its terms, the Act applies only to "a person who has been convicted of a felony" and only when that person has been "sentenced to a term of incarceration . . . and has served all or part of such sentence." §13-65-102(1)(a). Furthermore, "[a] petition may be filed pursuant to [the Act] only" after "a court has vacat[ed] or revers[ed] all convictions in the case" and only after the entry of "an order of dismissal of all charges" or "following an acquittal of all charges after retrial." §§13-65-102(2)(a)(I) & (II).

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[9] Link available at http://www.leg.state.co.us/CLICS/CLICS2013A/csl.nsf/BillFoldersHouse?OpenFrameSet, 3rd Reading Votes at p. 858.

[10] Link available at http://www.leg.state.co.us/CLICS/CLICS2013A/csl.nsf/BillFoldersHouse?OpenFrameSet, 3rd Reading Votes at p. 1221.

[11] Link available at http://www.leg.state.co.us/CLICS/CLICS2013A/csl.nsf/BillFoldersHouse?OpenFrameSet, History at p. 1.

If a person satisfies the prerequisites for filing a petition under the Act, he or she may file "a civil claim for relief" under the Act in the district court in the county in which the case originated, naming the state of Colorado as the respondent. §13-65-102(1)(a); §§13-65-102 (5)(a) & (b). If the government contests the petition, "the district court shall set the matter for a trial . . . at which trial the burden shall be on the petitioner to show by clear and convincing evidence that he or she is actually innocent of all crimes that are the subject of the petition." §13-65-102(6)(b). The Exoneration Act specifies that a court may not make a finding of actual innocence "merely . . . [b]ecause the court finds the evidence legally insufficient to support the petitioner's conviction," nor may a court make a finding of actual innocence "merely . . . [b]ecause the court reversed or vacated the petitioner's conviction because of a legal error unrelated to the petitioner's actual innocence. . . ." §§13-65-101(1)(b)(I) & (II).

When a petitioner proves by clear and convincing evidence that he or she is actually innocent, the Act mandates "an award of monetary compensation" in the amount of $70,000 for each year the petitioner was incarcerated, §13-65-103(3)(a), an additional $50,000 for each year he or she was incarcerated and sentenced to execution, and $25,000 for each year that he or she served on parole, on probation, or as a registered sex offender after a period of incarceration. §§13-65-103(3)(a)(I) & (II). The Act also requires that a petitioner be awarded "[c]ompensation for child support payments owed by the exonerated person that became

due during his or her incarceration or placement in state custody." §13-65-103(2)(e)(III).

Successful petitioners and certain family members are entitled to the waiver of tuition at any state institution of higher education (provided the petitioner was incarcerated for at least three years). §13-65-103(2)(e)(II)(B). An award must include the payment of reasonable attorneys' fees incurred in bringing a claim under the Act. §13-65-103(2)(e)(IV). And finally, a petitioner must be awarded "[t]he amount of any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful conviction or adjudication." §13-65-103(2)(e)(V) (hereafter referred to as the "Monetary Penalty Provision").

Either party is entitled to appeal, but payment of compensation to a successful petitioner is not to be delayed pending appeal. §13-65-102(7)(a) & (c). Somewhat ironically, and "[i]n the event the [state] prevails in an appeal, the court may take such action as is necessary to recover the amount of any compensation awarded to the petitioner." §13-65-102(7)(d).

The Monetary Penalty Provision contained in the Exoneration Act is the only provision in Colorado law that authorizes a court to order the repayment of fines, penalties, court costs, or restitution that have been imposed upon a defendant. *People v. Nelson*, 362 P.3d 1070, 1078 (Colo.2016) ("when a defendant's conviction is overturned and she is acquitted after a new trial, the trial court may authorize a refund of costs, fees, and

restitution only pursuant to the process created in the Exoneration Act."). As such, it is the exclusive means available to defendants who seek to recover monetary penalties upon reversal of their convictions. *Ibid.* But recovery under the Monetary Penalty Provision is subject to all of the same conditions that apply to recovering any form of compensation under the Exoneration Act: The Act does not create any carve-out for those defendants who seek only the recovery of monetary penalties following the reversal of their convictions.

As such, the only way that *any* defendant can obtain a refund of monetary penalties is to bring a civil action against the state of Colorado under the Act and prove his or her actual innocence by clear and convincing evidence. For the five-year period ending in 2012, the Colorado Attorney General did not think that even a single defendant would be able to meet that burden. The General Assembly itself estimated that one defendant would be able to meet that burden, on average, every five years. Beyond that, and by its terms, criminal defendants convicted of misdemeanor offenses, or those convicted of felonies but not incarcerated, are not even eligible to file a petition under the Act.

Thus, as the only statutory authority permitting the recovery of monetary penalties imposed in connection with convictions that are eventually reversed or vacated, the Exoneration Act – while obviously well-intentioned – serves to deny many criminal defendants even the possibility of such a recovery, and it imposes an unreasonably high burden on those who are at least permitted to file a petition under the Act. In other

words, the Exoneration Act denies the overwhelming majority of criminal defendants in Colorado any practical opportunity to recover monetary penalties following the reversal of their convictions.[12]

For all of the reasons stated in Ms. Nelson's and Mr. Madden's petition for a writ of certiorari, the requirements of the Exoneration Act that must be satisfied before a defendant can obtain a refund of monetary penalties following the reversal of a conviction violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[12] An informal canvassing of our members did not reveal even a single instance in which a member filed a petition under the Act seeking the recovery of monetary penalties following a reversal.